No. 68, 69 & 70.

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JAMES H. McKENNEY,
Clerk.

Reply Br. of Shaver for Appt.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Nov. 14, 1900.

In Equity, No. 68.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

v.

THE CLYDE STEAMSHIP COMPANY, THE GEORGIA RAILROAD AND BANKING COMPANY, ET AL., APPELLEES.

In Equity, No. 69.

SAME

v.

THE WESTERN AND ATLANTIC RAILROAD COMPANY ET AL., APPELLEES.

In Equity, No. 70.

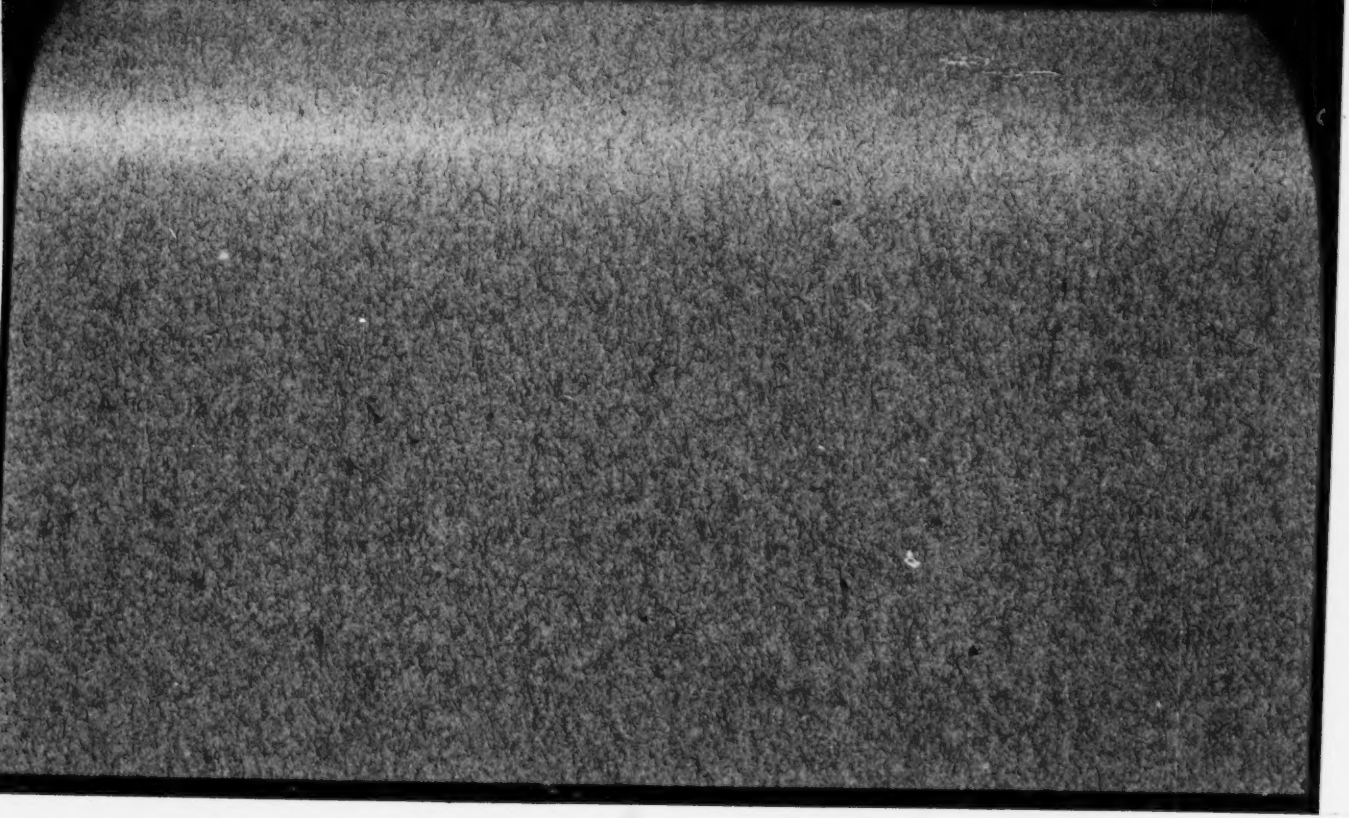
SAME

v.

THE CLYDE STEAMSHIP COMPANY, THE ATLANTA AND WEST POINT RAILROAD COMPANY, ET AL., APPELLEES.

REPLY ARGUMENT FOR THE APPELLANT.

L. A. SHAVER,
Solicitor.



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REPLY ARGUMENT FOR APPELLANT.

I.

1.

ORDERS OF COMMISSION CRITICISED ON THE GROUND THAT UNDER THEM THE CARRIERS MAY PRACTICE DISCRIMINATION TO THE EXTENT OF MAKING SHORTER DISTANCE RATES AS HIGH AS LONGER DISTANCE RATES.

It is urged as a ground for not enforcing the orders of the Commission that they simply prohibit the charging of higher rates to the shorter than to the longer distance points, and that, therefore, the carriers may still practice discrimination under them to the extent of making the shorter distance rates as high as the longer distance rates.

2.

THIS CRITICISM IS EQUALLY AS APPLICABLE TO THE LAW ITSELF AS TO THE ORDERS OF THE COMMISSION.

Section 4 of the law simply forbids *the greater charge for the shorter than the longer haul.* It does not expressly forbid *as high a charge for the shorter as for the longer haul.* Therefore, under section 4 the carrier may charge as high a rate for a shorter as for a longer haul.

The orders of the Commission in these cases pursue the language of the statute in simply prohibiting the greater charge for the shorter than the longer haul.

3.

THE COMMISSION'S ORDERS ARE CONSISTENT WITH THE VIEW THAT THE FORCE OF COMPETITION IS SOMEWHAT GREATER AT ATLANTA AND OPELIKA THAN AT THE SHORTER-DISTANCE POINTS.

One answer to the plea of competition, maintained before the court in our oral argument, was that, conceding for argument's sake the force of competition is greater at Atlanta and Opelika than at the shorter distance points, still, inasmuch as the latter points are admitted to be competitive points themselves, the force of competition at the former is not so much greater than at the latter as to justify *higher rates* to the latter, and that leaving the shorter distance rates *as high as* the longer distance rates will be making due allowance for any greater force of competition at Atlanta and Opelika than at the shorter distance points shown by the testimony in these cases.

The orders are consistent with this view.

4.

THE ORDERS OF THE COMMISSION, IF COMPLIED WITH BY LEAVING THE SHORTER DISTANCE RATES AS HIGH AS THE LONGER DISTANCE RATES, WILL DO AWAY WITH THE DISCRIMINATIONS AGAINST THE SHORTER DISTANCE POINTS, AND AFFORD RELIEF UNDER SECTION 3 OF THE LAW, AS WELL AS UNDER SECTION 4.

If the rates to the shorter distance points are made not higher than the rates to the longer distance points, this will do away with the unjust or undue prejudice or disadvantage to the shorter distance points shown to be the result of the *higher* rates to those points than to the longer distance points.

For example, the rate on class 1 goods from New York for the haul through Social Circle to Atlanta is $1.14 per hundred pounds. If the Social Circle rate is made the same, $1.14 per hundred pounds, Atlanta merchants *can not* lay down at Social Circle goods originally shipped from New York at the same aggregate rate as that on which the Social Circle merchant could place them there. The Atlanta merchant would have to pay the $1.14 rate to Atlanta plus the local rate of 30 cents back to Social Circle, whereas the Social Circle merchant would only pay the $1.14 rate.

As to *intermediate territory*—that is, territory between Social Circle and Atlanta—the Social Circle merchant having the same rate as the Atlanta merchant, could sell goods at a point *halfway between Social Circle and Atlanta* on terms of equality with the Atlanta merchant so far as rates are concerned, and would have the advantage over the Atlanta merchant in territory between *Social Circle* and the halfway point. The Atlanta merchant, on the other hand, would have the advantage over the Social Circle merchant in the territory between *Atlanta* and the halfway point. *This is just as it should be* and is illustrated by the following diagram:

Rate from New York to Atlanta	$1.14
Rate from New York to Social Circle	1.14
Rate from both Atlanta and Social Circle to intermediate halfway point	.15
Rate on reshipment from Social Circle	1.14+15=1.29
Rate on reshipment from Atlanta	1.14+15=1.29

Giving the shorter distance points rates the same as those to the longer distance points will therefore afford relief under section 3 as well as under section 4 of the law.

5.

THE ORDERS IN THESE CASES ARE THE SAME AS THE ORDER IN THE "SOCIAL CIRCLE CASE," APPROVED BY THIS COURT AND THE CIRCUIT COURT OF APPEALS, AND AS THE ORDER IN THE "CHATTANOOGA CASE," APPROVED BY THE CIRCUIT COURT AND CIRCUIT COURT OF APPEALS.

The order of the Commission in the "Social Circle Case" (162 U. S., 184), approved by the circuit court of appeals and by this court, was the same as the orders in the present cases, namely, that the rates to Social Circle should not be made higher than the rates to Augusta.

The order of the Commission in the "Chattanooga case" (argued and submitted at the last term) was also the same as the order in the present cases. In that case the Commission ordered that the rates to Chattanooga should not be higher than the rates for the longer haul through Chattanooga 151 miles on to Nashville. This order has been approved by the circuit court, Judge Severens rendering the decision, and by the circuit court of appeals for the sixth circuit, presided over by Mr. Justice Harlan and Circuit Judges, Taft and Lurton. Judge Severens, speaking of the order in the "Chattanooga case," says: "*It is a just and reasonable order and as near to the court's sense of the justice of the case as any the court could devise.*"

We have also a precedent for the orders in the present cases in trunk-line territory, where the rates to shorter distance points are sometimes made *as high as* the rates to longer distance points.

6.

COMMISSION HAS NO POWER TO PRESCRIBE RATES; THEREFORE CAN ONLY APPROXIMATE JUSTICE IN ITS ORDERS.

It is settled by this court that the Commission has no power to prescribe rates "maximum, minimum, or absolute." Therefore it can only approximate justice in its orders. As said by Judge Severens in the opinion of the circuit court in the "Chattanooga case," the Commission can only forbid the "continuance of an unlawful practice."

If the Commission were of the opinion that the shorter distance rates in a given case should be lower than the longer distance rates, it could only so order, and *could not prescribe the lower rates.* The carrier might comply with such an order by making its rates to the shorter distance point a *thousandth part of a cent* lower than to the longer distance point. This would be practically leaving the shorter distance rates as high as the longer distance rates.

II.

1.

CONTENTION OF COUNSEL FOR THE CARRIERS THAT MERCHANTS AT SHORTER DISTANCE POINTS CAN PLACE THEMSELVES ON AN EQUALITY WITH MERCHANTS AT LONGER DISTANCE BASING POINTS OR TRADE CENTERS BY SHIPPING THEIR GOODS DIRECT TO THE LATTER.

Counsel for the carriers in his oral argument contended that merchants at shorter distance points could ship goods through to the longer distance points direct at the same rates as merchants at such longer distance points would have to pay, and that, therefore, the former are placed on a basis of equality with the latter at the longer distance points and in intermediate territory.

This is equivalent to saying that the merchant at the shorter distance point can place himself on terms of equality with the merchant at the longer distance basing point by shipping goods *by his own door* to the longer distance basing point and distributing them from that point; *in other words, by transferring his business to the longer distance basing point.*

The merchants at the basing points can accumulate supplies of goods at those points and *reship* them to surrounding localities, and undersell at such localities the merchants at the shorter distance points, if the latter should undertake to make such *reshipments from their own places of business* at the shorter distance points.

We think the fallacy of the contention of counsel for the carriers is too plain for argument.

III.

1.

THE "EXCRESCENCE" ON OUR DIAGRAM IS ALSO AN "EXCRESCENCE" ON THE RATE.

We exhibited before the court the following diagram, illustrating the combination of the through rate from New York to Atlanta with the high local back to Social Circle as the through rate on a shipment from New York to Social Circle *direct*.

The large line underneath the small line between Atlanta and Social Circle represents the high local rate charged as a part of the through rate on goods shipped from New York to and *delivered at* Social Circle.

2.

Counsel for the carriers in his oral argument pronounced this large line an "*excrescence*," and it seemed to shock his esthetic sense. An "excrescence" is defined to be "*an unnatural outgrowth or addition.*" In this sense the high local rate from Atlanta to Social Circle, charged as a part of the through rate on goods shipped from New York to and delivered at Social Circle, *is an excrescence* on the Social Circle rate, and *should shock the moral sense of counsel for the carriers more than making it a part of the diagram seemed to shock his esthetic sense.*

IV.

THE PRESENT CASES STRONGER AGAINST THE CARRIERS THAN THE SOCIAL CIRCLE CASE.

ADDITIONAL DISTINCTION BETWEEN THE LATTER AND THE PRESENT CASES.

1.

In addition to the distinctions between the Social Circle Case (162 U. S., 184) and the present cases, *pointed out in our original printed argument* (pp. 178–181), there is another material distinction between that case and the status of Social Circle in case No. 68 now under consideration and of other localities in the present cases in the same category with Social Circle, namely, that the rates to Social Circle in case 68 and to such other localities in the same category embrace a charge for the haul through them on to the basing point and a charge for a local haul back, *when those hauls are not in fact made.*

In the Social Circle Case (162 U. S., 184), the basing point, Atlanta, was the shorter distance point, and Social Circle the longer distance point, and the haul was through the basing point to Social Circle. *The haul was in fact made* for which the two rates were charged (the through rate to Atlanta and the local from Atlanta *on to* Social Circle), *with the exception that no part of the haul was a local haul.*

2.

The shorter distance points in the present cases, the rates to which embrace charges for a haul on to the

basing point and a local haul back, when no such hauls have been made, are the following:

IN CASE NO. 68.
Social Circle.
Covington.
Conyers.
Stone Mountain.

IN CASE NO. 70.
West Point.

3.

AS TO THE OTHER SHORTER DISTANCE POINTS.

In case No. 69, the rates from Cincinnati to the shorter distance points, Calhoun, Adairsville, Kingston, Cartersville, Acworth, and Marietta, are the through rates to Chattanooga plus the local rates *on to those points*—in other words, the rates to these shorter distance points are based on the Chattanooga rates, and this in every instance results in higher rates than the rates for the haul through those points to Atlanta.

In case No. 68 the rates to the shorter distance points, Greensboro and Madison, are based on the Augusta rate and are the through rates from New York to Augusta plus the *locals on*, and this results in both instances in higher rates than the rates charged for the haul through Greensboro and Madison on to Atlanta.

In case No. 70 the rates to the shorter distance points, Newnan, Grantville, Hogansville, and Lagrange, are based on the Atlanta rates—that is, they are the through rates from New York to Atlanta plus the *locals on*, and this results in each instance in higher rates to those localities than are charged for the haul through them on to Opelika.

V.

RATES TO LA GRANGE, ACWORTH, AND MARIETTA ARE NOT THE LOWEST COMBINATION OF THROUGH AND LOCAL RATES.

1.

The circuit court of appeals in its decision in these cases, sustaining the combination of through and local rates as the rates to the shorter-distance points, did so on the express ground that they were *the lowest combination of through and local rates available*. In other words, that the combination was made up, in the language of the court, of "the through rate *to that competitive point* which, combined with the local rate from the competitive point to the point of destination, would give the lowest through rate."

(Record, case No. 69, bot. p. 276.)

2.

The rates from New York to La Grange (case No. 70) are *not the lowest combinations*. They are based on the Atlanta rates, and the lowest combinations would be rates based on the Opelika rates. This results from the facts that Opelika has the same rates from New York as Atlanta, and the distance from Opelika to Lagrange is only 38 miles, while from Atlanta to Lagrange it is 71 miles, and, therefore, the local rate from Opelika to Lagrange is lower than the local rate from Atlanta to Lagrange. Hence, as testified by the Lagrange merchants, Opelika merchants can reship goods received from New York back to Lagrange and *undersell* the Lagrange merchants.

(Original printed argument for Commission, p. 162.)

3.

The rates from Cincinnati to Acworth and Marietta (case No. 69) *are not the lowest combinations.* They are based on Chattanooga, and the lowest combinations would be on Atlanta. Hence, as testified by merchants at those localities, goods can be shipped through Acworth and Marietta to Atlanta and back to Acworth and Marietta at *lower rates* than they can be shipped to Acworth and Marietta direct.

(Original printed argument for Commission, p. 166.)

VI.

COURT MAY MODIFY ORDER OF THE COMMISSION, AT LEAST TO THE EXTENT OF SUSTAINING IT ONLY AS TO SOME OF THE SHORTER DISTANCE POINTS, IF IT SHOULD BE OF OPINION THE ORDER OUGHT NOT TO BE ENFORCED AS TO ALL.

1.

This court and the circuit court of appeals modified the order of the Commission in the Social Circle case (162 U. S., 184) by sustaining it in part and overruling it in part.

The order of the Commission in that case had two subdivisions. In one it forbade the charging of higher rates from Cincinnati to Social Circle than were charged for the longer haul through Social Circle to Augusta, and in the other it directed that the rate from Cincinnati to Atlanta should be reduced from $1.07 to $1. The circuit court of appeals for the fifth circuit rendered a decree *enforcing the first subdivision of the order only* and denying the prayer of the Commission for the enforcement of the second subdivision reducing the rate to Atlanta.

This court sustained the decree of the circuit court of appeals.

2.

In the "Alabama Midland case" (168 U. S., 175) this court says:

The courts are not restricted "to a consideration merely of the power of the Commission *to make a par-*

ticular order in question, but additional evidence may be put in by either party and the duty of the court is to decide as a court of equity upon the entire body of the evidence."

The court may modify an order made by the Commission, so as to adapt it to the ends of justice under the entire body of the evidence before the court, and may, therefore, affirm the orders of the Commission in these cases *as to some of the shorter distance points*, although it might be of opinion that the ends of justice do not require its affirmance as to all such points.

We claim the orders should be affirmed as to all the shorter distance points.

VII.

MAJORITY OF PUBLIC INTERESTS WILL BE PROMOTED BY ENFORCING ORDERS OF COMMISSION.

1.

Counsel for the carriers says, in his printed argument filed in this court (p. 83):

"The court must look to the interests *of the great majority of the public;* and if it conflicts with the interests of a small minority the loss to the latter is, in contemplation of law, *damnum absque injuria.*"

If this be a correct proposition, still we contend that the interests "of the great majority of the public" will be promoted by enforcing the orders of the Commission.

2.

Counsel for the carriers states that "the public interest consists of three classes," as follows:

"*First*, the public at Cincinnati, Boston, New York, Philadelphia, and Baltimore.
"*Second*, the public at Atlanta and Opelika.
"*Third*, the public at the shorter-distance points."
(Printed argument for carriers, p. 83.)

We claim that the LAWFUL *interests of all these classes, as well as of the carriers, will be advanced by enforcing the orders of the Commission.*

3.

PUBLIC INTEREST AT SHORTER-DISTANCE POINTS.

Counsel for the carriers says, "*It is admitted that the public interest at the shorter-distance points is discriminated against.*"

(Printed argument for carriers, p. 83.)

It is thus conceded that the interest of one class of the public, the shorter-distance points, is not subserved but is prejudiced by the discrimination.

We have shown, in both our oral and original printed arguments, that the public interests *of all the shorter-distance points discriminated against for the 138 miles* between Atlanta and Chattanooga, for the *171 miles* between Atlanta and Augusta, and for the *109 miles* between Atlanta and Opelika, are of far greater magnitude than the public interest centered at Atlanta or Opelika, or both taken together.

(See original printed argument for Commission, pp. 185, 186.)

4.

PUBLIC INTERESTS AT SHIPPING POINTS, CINCINNATI, NEW YORK, ETC.

The public interests at the shipping points, Cincinnati, New York, etc., can not be prejudiced, but, on the contrary, will be promoted by establishing a just relation between the rates to the shorter and longer distance points, thus enabling the former to sell goods in competition with the latter.

Whatever loss to the shipping points, New York, Cincinnati, etc., in trade with Atlanta and Opelika, may result, will be compensated or more than compensated by the increase in their business with the shorter distance points.

That the business at shorter distance points will be enlarged and their demand for goods *from the shipping points* be increased, appears from the following considerations:

First. "The result of lower rates is generally a *greater demand* for the articles transported, and this greater demand can only be gratified by a *larger supply.*" (Joint Traffic Association case, 171 U. S., 505).

This "larger supply" called for at the shorter distance points will be furnished by the shipping points, New York, Cincinnati, etc.

Second. Lower rates result in cheaper goods, and this will increase the *actual consumption* at the shorter distance points.

Third. Lower rates will also stimulate the business at shorter distance points, particularly where such lower rates enable merchants at those points to compete on terms of equality with other localities in the same territory.

"The stimulus given business at intermediate points" (by reduction of rates) "will increase traffic largely. That proposition has been so often practically demonstrated that no intelligent observer can reject it."
(Opinion of Mr. Aldace F. Walker; see original printed argument for the Commission, p. 215).

"At present the amount shipped to intermediate points is relatively very small. Giving such points the rates charged at more distant points, if adopted and maintained as a general principle, would necessarily encourage local industry and enterprise."
(Opinion of Mr. Aldace F. Walker; see original printed argument for the Commission, p. 216).

Fourth. Lower and nondiscriminatory rates will not only increase the business of *merchants already at the shorter distance points, but will induce population and other merchants to come to those points and engage in business and invest their capital there.*

For the foregoing reasons, whatever loss to the shipping points, New York, Cincinnati, etc., in business with Atlanta and Opelika may result from reducing the rates to the shorter distance points, will be more than compensated by the increase in trade of those shipping points with the shorter distance points.

5.

THE PUBLIC INTEREST AT ATLANTA AND OPELIKA.

Counsel for the carriers has not pointed out any way in which any *legitimate* interest of the public at Atlanta or Opelika will be injuriously affected by establishing a just relation between the rates to those points and to the shorter distance points. On top of page 111 of his printed argument filed in this court he says:

"If the rates to the shorter distance points involved in these cases should be reduced, so as to be not higher than the rates to Atlanta and Opelika, it would doubtless in some instances induce merchants at the shorter distance points to purchase their goods in Cincinnati, New York, etc., *instead of purchasing them in Atlanta or Opelika, as they have heretofore done.*"

The testimony of the merchants at the shorter distance points (the only testimony on the subject) is that *they now purchase their supplies of goods from Cincinnati, New York, etc., and not from Atlanta or Opelika.*

Answer of S. T. Whittaker to Q. 10, Record, case 70, p. 49.

Answer of Luther S. Turner to Q. 10, Record, case 70, p. 51.

Answer of C. V. Truit to Q. 10, Record, case 70, p. 40.

Answer of L. Trammell to Q. 10, Record, case 68, p. 32.

Answer of W. L. Sessions to Q. 10, Record, case 69, p. 90.

Answer of D. N. Anderson to Q. 10, Record, case 69, p. 92.

Answer of J. W. Knight to Q. 10, Record, case 69, p. 91.

Answer of Thomas Lumpkin to Q. 10, Record, case 69, p. 80.

(See original printed argument for Commission, pp. 115–117.)

But conceding that making the shorter distance rates not higher than the longer distance rates would result in causing merchants at shorter distance points to procure supplies from New York, Cincinnati, etc., which they had theretofore gotten from Atlanta or Opelika, *is injury thus done to any lawful or legitimate interest of Atlanta or Opelika?* Have Atlanta or Opelika any natural inalienable right or prerogative to supply surrounding localities with their goods and *to have them debarred by discriminatory rates from securing their supplies direct from the sources of supply, such as New York and Cincinnati?*

6.

To sum the matter up, we contend and think we have demonstrated that the public interest both at the shorter distance points and at the shipping points will be promoted by enforcing the orders of the Commission, and that no lawful interests of the basing points or trade centers, Atlanta and Opelika, can be injuriously affected.

INTEREST OF CARRIERS.

We further contend that any reduction in the tonnage of traffic hauled by the carriers to Atlanta and Opelika will be compensated or more than compensated by an increase in the tonnage of traffic hauled by them to the shorter distance points, and that *the interests of the carriers will thus be protected if not advanced.*

VIII.

1.

See discussion of orders of Commission in our *original printed argument*, Chapters XXVIII, XXIX, XXX, XXXI, XXXII, and XXXIII, pp. 193–222.

2.

See discussion of "BURDEN OF PROOF" as to excessiveness of rates and as to how that burden *has been shifted*, in our *original* printed argument, Chapter XXXV, and *particularly pages 229–234*.

3.

ACTION OF COMMISSION IN REFUSING TO CONSIDER COMPETITION BY CARRIERS SUBJECT TO THE LAW.

As applicable for the most part to the present cases, attention is respectfully asked to *Chapter XXII, pp. 151–155, of our original printed argument in the* "CHATTANOOGA CASE," in which are pointed out the distinctions between that case and the "Behlmer Case" in respect to the action of the Commission in refusing to consider competition by carriers subject to the act.

This court in the "Import Case" (162 U. S., p. 239) held that where the Commission has "*unduly restricted its inquiries upon a* mistaken view of the law" the court "*should either inquire into the facts on its own account* or send the case back to the Commission to be lawfully proceeded in."

It is thus held that it is *left to the discretion* of the court in such cases "either *to inquire into the facts on its own account* or to send the case back to the Commission." The statute, section 16 of the act to regulate commerce also provides that the courts may inquire into these cases on their own account, and to that end *may take additional testimony*. Both the courts below in these cases, as in the "Chattanooga Case," *elected* to inquire into the matters in controversy on their own account, and *with that view the trial court* (*circuit court*) *allowed new testimony to be introduced before it* larger in amount than that before the Commission.

The courts below having thus exercised their discretion by "*inquiring into the facts on their own account*," it is not incumbent upon this court to have the cases remanded to the Commission, particularly as the Commission found the facts fully *on the testimony before it*, and its error was an *error of law*, which it is peculiarly the function of the courts to correct. The conclusions of the Commission on a *part only* of the evidence (that before it) can not be of much value after the case has been reopened by the court and new testimony has been taken.

L. A. SHAVER,
Solicitor for Complainant.

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68, 69 & 70.

Reply Br. of Mayes for Appts.

In the Supreme Court of the United States Court

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JAMES H. McKENNEY, Clerk

October Term, 1900.

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SURREJOINDER ARGUMENT FOR THE APPELLANT.

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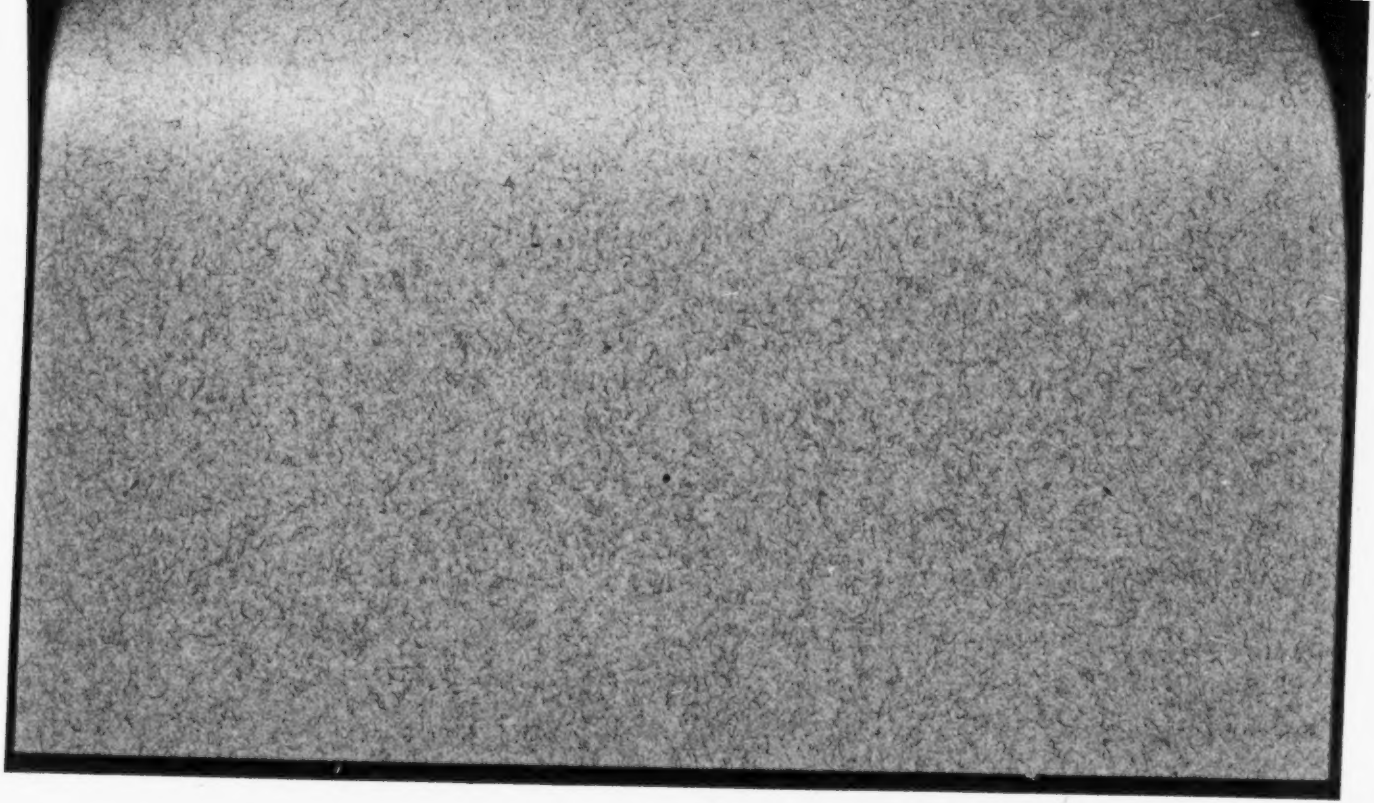

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   (*b*) *The bulk of the freight to shorter-distance points consists of groceries, dry goods, clothing, boots, and shoes, and the shipments are for the most part to merchants and in carloads* 5, 6

4. Counsel for carriers goes outside the records in these cases and cites the finding of facts by the Commission *in another case* as to the practice of the *New York, New Haven and Hartford Railroad*, while neglecting to adduce the proof in his possession *relating to the practice of the defendants themselves* 6

5. CLAIM THAT HIGHER RATES TO SHORTER-DISTANCE POINTS ARE DUE TO EXTRA EXPENSE ON HAULS TO THOSE POINTS INCONSISTENT WITH PLEA OF COMPETITION HERETOFORE SOLELY INSISTED UPON ... 7

   (*a*) If due to such extra expense, proof should have been made by the carriers of that fact and also of the amount of that expense 7

   (*b*) No claim of extra expense set up in the answers of the defendant carriers. Competition the only plea 7

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6. Our "excrescent" diagram 8
   (a) *Local* rates of Georgia Railroad Commission over *four* times as high per mile as *through* rates 8
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SUR-REJOINDER ARGUMENT FOR APPELLANT.

I.

On page 24 of his rejoinder argument recently filed, counsel for the carriers cites the testimony of witness Brown IN CASE 69, that freight FROM CINCINNATI to local stations between Chattanooga and Atlanta is delivered at such stations by local freight trains.

1.

NO TESTIMONY OF THIS KIND IN CASES 68 AND 70.

It is significant that there is no such testimony in cases 68 and 70, the one involving rates *from New York* to Atlanta and to local stations between Augusta and Atlanta, and the other involving rates *from New York* to Opelika and local stations between Opelika and Atlanta.

As counsel evidently recognizes the importance of such proof and made it in case 69 as to *freight from Cincinnati*, the presumption is that he would have made it in cases *68 and 70* as to *freight from New York*, if there existed any basis for such proof in those cases.

It is clear that the testimony of the witness Brown as to the practice in reference to *freight from Cincinnati* does not warrant counsel's statement that the evidence shows the existence of the same practice as to freight from New York.

2.

WITNESS BROWN DOES NOT DISTINGUISH CARLOAD AND LESS THAN CARLOAD SHIPMENTS.

Moreover, the testimony of the witness Brown is defective, if not worthless, in that it fails to distinguish between "*Carload*" and "*less than carload*" freight.

Less than carload freight from Cincinnati may be transferred at Chattanooga from a car in a through train to a car in a local train, but such is not the case as to *carloads*. They naturally go through in the cars in which they are originally loaded, and such is the undisputed testimony.

(*See testimony of merchants at Marietta and Cartersville, in Original Printed Argument for Commission*, pp. 116, 117).

3.

MARSHALING OF CARS IN THROUGH TRAINS.

If I may be permitted to follow the example of counsel for the carriers and go outside the record in these cases, I will state that the proof in other cases before the Commission has shown that the cars on through trains are, in railway parlance, "MARSHALED"—that is, they are arranged in such order that cars containing carloads can be detached from the *end of the train* and left at their respective destinations, while the balance of the through train moves on. (5 I. C. C., p. 34.)

For example, if on a haul through A, B, and C, to D, a through train be composed of a number of cars, some destined to A, some to B, some to C, and some to D, the cars destined for A, the first station, are placed at the rear end of the train, those for B next, those for C next, and those for D, the terminus of the through haul, next.

4.

NO GREATER EXPENSE ON CARLOAD SHIPMENTS TO LOCAL STATIONS THAN TO TERMINAL COMPETITIVE POINTS.

Under this system of "*marshaling*" cars in a through train, there is no greater expense on the hauls to intermediate local stations than to the terminal station. This is doubtless the practice as to *carload* shipments to the shorter-distance points in these cases, and the evidence that the goods are hauled

through in the cars in which they are originally loaded tends to prove it, and *shows conclusively that there is no transfer en route from one car to another, but at most merely a switching service.*

The local rates, charged as a part of the through rates to the shorter-distance points in these cases, were fixed by the Georgia Railroad Commission to cover the expense of *original strictly local* shipments—that is, shipments *originating* at, for example, Atlanta and ending at Social Circle or *vice versa*—and were not intended to apply to a mere transfer of cars or freight *en route* on a through haul. The expense in the former case is greater than in the latter.

In the case against the *Louisville and Nashville Railroad Company, the Western Railway of Alabama*, and *the Atlanta and West Point Railway*, now pending in the circuit court of appeals for the fifth circuit, it was proven that carload shipments from New Orleans to La Grange (a local station) were not more expensive to the carrier than such shipments through La Grange to Atlanta. *The same proof was made as to less than carload shipments.* This testimony was brought out on cross-examination of the witness Lutz, traffic manager of the Atlanta and West Point Railroad and the Western Railway of Alabama, *two of the defendants in the present case, No. 70.*

5.

THE SHIPMENTS TO SHORTER-DISTANCE POINTS CONSIST, FOR THE MOST PART, OF GROCERIES, DRY GOODS, CLOTHING, BOOTS AND SHOES, AND ARE SHIPPED TO MERCHANTS IN CARLOADS.

It is to be noted that *consumers* at the shorter-distance points do not buy their personal or household supplies from distant supply markets like New York or Cincinnati, but from

their local or home merchants. These merchants naturally purchase goods in large quantities, or carload lots.

The witness Brown testifies that the traffic from "Ohio River crossings" (Cincinnati, Evansville, etc.) "consists largely of *groceries, clothing, boots, and shoes.*"
(Record in case 69, bot. p. 139.)

Dry goods, clothing, boots, shoes, etc., also constitute a large part of the traffic from New York. All these articles are generally purchased by merchants in large quantities and are consequently shipped in carloads.

6.

THE KNOWLEDGE OF THEIR OWN PRACTICE AS TO SHIPMENTS TO LOCAL STATIONS LIES PECULIARLY IN THE POSSESSION OF THE CARRIERS, AND THE BURDEN WAS UPON THEM TO MAKE PROOF OF IT AND NOT LEAVE IT TO CONJECTURE.

It is further to be borne in mind that the practice of the carriers in respect to the transportation of freight to local stations is a matter the knowledge of which lies peculiarly in their possession, and, under the familiar rule, the burden was upon them to prove that practice. *Moreover, it is matter of defense.*

Instead of proving that practice as to carloads and less than carloads on the roads of the defendants in these cases, counsel goes outside the records and cites what he claims the Commission in another case found to be the practice on the New York, New Haven and Hartford Railroad, not a party to this proceeding and located a thousand miles away in a totally different territory.' (Bot. p. 24, rejoinder argument for carriers.)

7.

INCONSISTENT WITH PLEA OF COMPETITION.

The claim now insisted upon *at the "eleventh hour,"* that the higher rates to the shorter distance points are due to extra expense on shipments to those points, is inconsistent with the plea of competition heretofore solely relied upon.

If the difference between the rates to the shorter and longer distance points is the result of competition, then it is not attributable to extra expense on hauls to shorter distance points. If it is the result of such extra expense, then it is not attributable to competition.

If the higher rates to the shorter distance points are due to extra expense on hauls to those points, the burden was upon the carriers, not only to prove that fact but also to show the amount of that expense or to give the court some idea of that amount, so that the court might determine whether the difference between the two sets of rates was warranted by such extra expense. As before stated, *it is strictly matter of defense.*

8.

EXTRA EXPENSE NOT ALLEGED IN ANSWERS OF DEFENDANTS.

The answers of the defendant carriers do not allege that the higher rates to the shorter than to the longer distance points are the result of extra expense on hauls to the former. The only justification averred in the answers, both before the Commission and the court, is competition. (Record in Case 69, pp. 9, 65, 71.)

II.

OUR EXCRESCENT DIAGRAM. LOCAL RATES OF GEORGIA RAILROAD COMMISSION OVER FOUR TIMES AS HIGH PER MILE AS THROUGH RATES.

Counsel for the carriers is evidently much disquieted or "exercised" by what he calls the "excrescence" on our diagram. He reproduces the diagram on page 9 of his rejoinder argument, and devotes several pages to showing that the local rate between Atlanta and Social Circle is not as many times higher per mile than the through rate as would be indicated by the lines in the diagram representing the two rates.

Our diagram did not purport to be absolutely accurate in this respect. It was only intended to illustrate the fact that rates to shorter distance points embraced a charge for a haul on to the basing point plus a *relatively high local rate* for a haul back when the freight was delivered at the shorter distance point, and these two hauls were not in fact made. If we had drawn the diagram ourselves and it had occurred to us, we would have made the line representing the local rate only *four or five times* as large as the line representing the through rate.

In our oral argument we showed that the local rail rate was *over four times* as high per mile as the through rail rate, comparing for illustration the local rate for the 71 miles between Atlanta and La Grange with the through rate for the 875 miles by the short *all-rail* line from New York to Atlanta, as follows:

	Rate per ton per mile.
Atlanta to Lagrange, 71 miles, local rate, 40 cents	11.4 cents
New York to Atlanta, 875 miles by rail, through rate, $1.14	2.6 cents

Below is shown the rate per ton per mile under the *rail and water through* rate for a *constructive* mileage of 558 miles from

New York to Atlanta and under the local rate for 71 miles between Atlanta and Lagrange:

	Rate per ton per mile.
Atlanta to Lagrange, 71 miles, local rate, 40 cents.....	11.4 cents
New York to Atlanta, 558 miles, through rate, 81.14.....	4.09 cents

In discussing our "excrescent" diagram, counsel for the carriers makes the following admission:

"It is conceded that the rates charged by the defendants from New York to Social Circle *are as much through rates as those charged from New York to Atlanta.* Through bills of lading are issued from New York to Social Circle, just as from New York to Atlanta. Freight from New York to Social Circle *is delivered at Social Circle without being carried through Social Circle to Atlanta and then back to Social Circle.* (Italics mine.) (Bot. p. 9, rejoinder argument for carriers.)

This being so, what excuse is there for charging the proportion of the Atlanta through rate from Social Circle to Atlanta and the relatively high local rate back as parts of the through rate to Social Circle?

To say that this is not charging *for two hauls not performed* because the local rate between Atlanta and Social is *merged*, so to speak, in the through rate to Social Circle, and when distributed along the entire line from New York to Social Circle does not result in an "excrescence" on a diagram—*in other words, does not present itself to the eye in all its naked deformity*—is simply to raise a "distinction without" as much "difference" as that between "tweedledum and tweedledee."

III.

OUR ALLEGED INCONSISTENCY.

Counsel for carriers, as showing that injury would result to Atlanta and Opelika from the enforcement of the orders of the Commission, stated (*top p. 111, original printed argument for carriers*) that the merchants at shorter distance

points might be induced "to purchase their goods in Cincinnati, New York, etc., *instead of purchasing them in Atlanta and Opelika, as they have heretofore done.*" [Italics mine.]

In reply to this we, in our printed reply argument (p. 21), called attention to the testimony, showing that the merchants at the shorter distance points *now purchase their supplies of goods from Cincinnati, New York, etc.*

We then further said:

"But conceding that making the shorter distance rates not higher than the longer distance rates would result in causing merchants at shorter distance points to procure supplies from New York, Cincinnati, etc., which they had theretofore gotten from Atlanta or Opelika, *is injury thus done to any lawful or legitimate interest of Atlanta or Opelika?* Have Atlanta or Opelika any natural inalienable right or prerogative to supply surrounding localities with their goods and *to have them debarred by discriminatory rates from securing their supplies direct from the sources of supply, such as New York and Cincinnati?*"

Counsel for the carriers sees in this last statement or query an inconsistency with our statement that the merchants at the shorter distance points now buy their goods from New York, etc. (See rejoinder argument for carriers, bottom p. 22.) *We can not see it, and reaffirm all we have had said in this connection.*

Counsel further contends that the fact that merchants at shorter distance points now buy their goods for the most part from New York, Cincinnati, etc., instead of procuring them from Atlanta and Opelika, shows there is no discrimination against the shorter distance points. He says:

"The statement" (that they now buy their goods at New York, Cincinnati, etc.), "shows that the *present relation of rates*, so far from unjustly discriminating in favor of Atlanta and Opelika, is such that the merchants at the shorter distance points, instead of purchasing their goods at Atlanta and Opelika, find it to their interest to purchase at New York or Cincinnati." (Italics mine.)

"*The present relation of rates*" complained of is such as to debar shorter distance merchants from competition with merchants at Atlanta and Opelika in common territory and to build up the latter at the expense of the former. *This is the discrimination in question.*

The *rates complained of* are rates from New York and Cincinnati to the shorter distance points, and *this implies purchase from the former* and shipment to the latter. *Such purchase is the very basis of these proceedings*, and the fact of such purchase has no possible bearing on *the discrimination in question.*

IV.

THIS COURT SHOULD INQUIRE INTO THE FACTS ON ITS OWN ACCOUNT, AND IN VIEW OF THE ENORMITY OF THE WRONGS INCIDENT TO THE SYSTEM OF RATES COMPLAINED OF, SHOULD NOT DIRECTLY OR INDIRECTLY SANCTION THAT SYSTEM IF IT CAN POSSIBLY BE AVOIDED.

On page 23 of the rejoinder argument for the carriers, it is practically admitted that the lower courts, in the exercise of their discretion, have inquired into the facts in these cases on their own account, and that this court may do likewise.

The injury or prejudice to the shorter distance points resulting from the discriminations complained of is *not denied*, and it is clear that these cases fall within the evil the law was designed to remedy. In view of this and the further fact that the courts below *ignored the evidence as to the excessiveness of the shorter distance rates* (original argument for Commission, pp. 60–62), *and refused to consider other material matters* (assignment of error, 6, 7, 11, 13, 19, 20, 21, original argument for Commission, pp. 18–21), this court is earnestly solicited to inquire fully into the facts on its own account.

The Southern Trade Center, or Basing Point System, the gross injustice of which is illustrated in these cases, should not, if it can possibly be avoided, receive the sanction of this great tribunal, directly or indirectly. Such sanction would tend to fasten it upon the country indefinitely, if not for all time; it would be a great public calamity, and would defeat one of the principal objects which the commerce law was intended to accomplish. (Original Printed Argument for Commission, p. 135.)

As showing that the greater charge for the shorter than the longer haul prevails *as a rule* only in Southern territory (see *testimony of Jessie M. Smith* (the only testimony on this point) *in answer to interrogatories 4, 5, 6, 7, and 8, Record in Case 69, pp. 98, 99*).

V.

OUR ALLEGED ADMISSION.

Counsel for carriers, on page 3 of his rejoinder argument, claims that we "virtually concede that the force of competition at Atlanta and Opelika is at least somewhat greater than at the shorter distance points," by our statement on page 6 of our reply argument, "that the Commission's orders are consistent with the view that the force of competition is somewhat greater at Atlanta and Opelika than at the shorter distance points."

This quotation from our reply argument is the heading of a subdivision of that argument. In the body of the subdivision we state the matter *hypothetically*—that is, that "CONCEDING FOR ARGUMENT'S SAKE the force of competition at Atlanta and Opelika is greater than at the shorter distance points," the orders are consistent with that view. (Reply argument for Commission, p. 6.)

Counsel further contends that this statement in our reply argument is "inconsistent with our argument that the rates at Atlanta and Opelika are made by agreement between the

carriers." *It is one of the undisputed, conceded facts in these cases that those rates are made by agreement between the carriers.* (See testimony cited in our original printed argument, p. 82.)

Moreover, a statement *hypothetically* of one proposition does not preclude the maintenance of an alternative or different proposition. There is no inconsistency in such a case and no absolute admission of the hypothesis.

VI.

CRITICISM OF ORDERS OF COMMISSION ON THE GROUND THAT UNDER THEM RATES TO SHORTER DISTANCE POINTS MAY BE LEFT AS HIGH AS RATES TO LONGER DISTANCE POINTS.

In addition to what is said in our reply argument (pp. 5–9), in answer to the above criticism or hypercriticism, the attention of the court is asked to the discussion of this matter in *our original printed argument, pp. 199–202.*

VII.

DISTANCE—MILEAGE RATES.

The Commission has not held in these cases, as contended by counsel for carriers (rejoinder argument for carriers, p. 2), that distance is the only or controlling factor in establishing rate adjustments as between different localities. (Original printed argument for Commission, pp. 220, 221.)

Section 4 of the law, in forbidding the greater charge for the shorter haul, makes distance a controlling factor in the absence of substantially dissimilar circumstances and conditions. The Commission has gone no further than this.

As to the position of the Commission in reference to *mileage rates*, see original printed argument for Commission, pp. 220, 221.

Respectfully submitted.

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For Appellant.

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